



CHAPTER 2

Planning and Preparation

2.1 Careful Planning and Documentation is Key

Procurement actions cannot be carried out successfully without sufficient planning and preparation by the agency. Planning lays the groundwork for an efficient and effective process. It provides information that enables staff to decide how best to accomplish the procurement, what specific actions need to be taken to obtain the service, and how to assure contract performance is accomplished to meet program requirements. Advance planning also provides the means for an agency to assure it is in full compliance with state statutes, regulations, policies and procedures. Good analysis, good thinking, and good planning are the best ways to ensure selection of a qualified consultant. Selecting a qualified consultant sets the stage for success, but good contract management will help ensure that the agency gets the results expected from the contract.

Documentation plays an important role in the whole contracting process. It is important to document the decisions made throughout the contracting process. Appendix F contains several examples of documentation forms, but agencies have discretion in how documentation occurs, so these forms are examples only.

2.2 Define Your Needs

In the initial stage of planning, the agency should develop a clear perception and description of the need.

Defining the need contributes to effective prioritization of the funding required, a common understanding within the agency of the need, and the identification of the nature of the work and the level of service required to meet the need. Defining the need also contributes to the determination of how performance and quality will be measured.

The ability to specify and convey what is needed forms the basis for obtaining a fair and reasonable price while selecting the best-qualified contractor.

Two questions should be answered: 1) Is there a real need for the service? and 2) If there is a real need or problem, what is the most feasible method to resolve it? Answers to these questions should become clear in the process of developing a work statement. The work statement should begin with a clear definition of the issue, need, or problem, and be supplemented with comprehensive background information regarding the work needed. This affords management an instrument to weigh all options.

2.3 Risk Assessment Approach to Contracting

Risk assessment is the process of evaluating exposure to harm or loss that could arise from some activity associated with the personal service contract. It consists of identifying and classifying risks based on certain characteristics, and measuring and evaluating the consequences of these risks.

Contract managers should conduct a risk assessment throughout the contracting process, including when:

1. Deciding to contract out services and selecting contractors;
2. Determining the level of monitoring and/or auditing needed;
3. Targeting efforts to areas of greater risk; and
4. Prioritizing contracts for monitoring and/or auditing purposes.

The risk-based approach allows contract managers to better focus their oversight efforts on higher risk contracts. A risk assessment evaluates risk factors in order to determine contract language to include in the contract, to mitigate risks and how much monitoring and/or auditing should be done.

Examples of risk factors that may be considered are:

- The state agency's experience with the contractor,
- Contractor systems and controls, and
- Changes in the contractor's operations or personnel.

Risk factors can be broken out into two broad categories: 1) risks associated with personal services, and 2) risks associated with personal services contractors.

Risks associated with personal services: Examples of factors that may be considered in assessing risk include the

following:

Funding – Is the amount of funding small or large?

Complexity – Are service requirements simple or complex?

Payment method – What type of payment method will be used? (e.g., cost reimbursement, fee for service, performance based.) What experience does the state agency have with the method?

Competition – Are contracts awarded on a competitive basis, which includes detailed evaluations of the personal service proposal, costs, and contractor qualifications, or are they awarded on a noncompetitive basis?

Risks associated with personal service contractors:
Examples of factors that may be considered in assessing risk include:

Funding that the contractor receives from the agency – Is the amount of funding small or large? Does the contractor have many or few contracts with the state?

Length of time in business – Has the contractor been in business for several years or is the business new?

Experience and past performance – Does the contractor have contracts for similar services with other governmental entities? How extensive is the contractor's experience with the state for this type of service? What is their performance history? Have there been changes in key staff?

Accreditation/licensure – Are contractors licensed and insured?

Financial health and practices – Is the contractor's financial condition good or poor? Does the contractor demonstrate sound financial practices? Is the contractor's financial record keeping system adequate for the number and complexity of funding sources being managed? Does the contractor do business with related parties and, if yes, does this business affect agency funds?

Board of directors – If the contractor is a nonprofit organization, does the board take an active role in directing

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the organization, establishing management policies and procedures, and monitoring the organization's financial and programmatic performance? Is the board comprised of individuals who are unrelated? Do employees or former employees of the organization serve as board members?

Subcontracting – Does the contractor subcontract key activities? Does the contractor have an effective monitoring function to oversee these subcontracts?

Organizational changes – Has there been frequent turnover of contractor management, senior accounting staff or key program personnel? Has the contractor taken on any new services within the last 12 months? Has the contractor experienced a recent rapid growth or downsizing? Has the contractor experienced reorganization within the last 12 months? Has the contractor changed major subcontractors recently?

Management structure – Is the organization centralized or decentralized? How much control does the organization have over decentralized functions?

Legal actions – Have any lawsuits been filed against the contractor within the last 12 months?

Based on the results of the risk assessment, contract managers may decide whether to contract out services, which contractor to select or the scope, frequency, and methods of monitoring and/or auditing to be used to ensure sufficient oversight, given the risks involved. Risk assessment results may also be used to devise more stringent controls and tighter contract language, when appropriate, to adequately monitor and/or audit the use of public funds.

Risk management strategies include transferring risk to the contractor, minimizing or mitigating the risk, eliminating the risk, or sharing the risk with the contractor. Contract managers may:

- Add clauses to the contract to address specific risk factors.
- Require contractors to provide proof of insurance.
- Develop and implement effective monitoring plans and contractor reporting requirements.

- Link payments to deliverables/performance measures.

It is also important to note that the risk inherent in a contractor's potential performance is dynamic. The risk assessment should be updated periodically to promote fair consideration of the contractor's performance.

2.4 Get Management Support

Management's buy-off of the project is another step to determine whether to proceed beyond the planning phase. Each agency will proceed in this phase according to its own internal processes. Management will play a key role in preparing the agency for the project. This support will:

- Clarify what the consultant will be doing.
- Prepare staff to assist the consultant.
- Improve the consultant's productivity.
- Minimize the inconvenience and disruption to staff due to the consultant's presence.
- Establish responsibility for post-contract decisions, wherein the consultant's recommendations are implemented.

2.5 Why Use a Consultant?

Agencies use consultants to meet needs or to address specific problems when internal resources are not available. Consultants have historically been used to provide:

Specialized Skills, Knowledge and Resources – An agency might engage a professional consultant to focus greater specialized knowledge and technical skill on a problem than can be provided by internal staff. A qualified consultant will possess the body of knowledge, skills and techniques in a given area of specialization.

Broad Experience – While each agency's situation is in some respects unique, few problems are completely without precedent to professional consultants. An experienced consultant has learned to anticipate problems and draw from techniques developed in similar situations for solving

the problems. Often a consultant can offer an agency previously tested solutions to chronic operational or technical problems.

Objectivity – One of the most valuable attributes of an outside consultant is objectivity. The consultant may offer an independent and impartial perspective that brings fresh and constructive insights into a situation.

Credibility – In some instances, state agencies must present findings and recommendations to policy makers, such as the Governor, Legislature, commissions, etc. An independent qualified source can often bring credibility to an evaluation of the problem. Policy makers often value recommendations offered by reputable consultants with extensive expertise and stature in their fields.

Timeliness – A consultant can devote a concentrated effort to an identified problem without the distractions of daily operating responsibilities. This is particularly important when a deadline for a project has been established and staff schedules and other work assignments conflict with the project completion date.

Innovation – A consultant can fill an important role in advocating change. Occasionally, solutions fail internally because vested interests, internal loyalties, tradition or pre-conceptions promote resistance to change. An effective consultant can offer innovative suggestions and inform decision makers of the benefits of creative approaches to long-standing problems.

If agency management determines that a project is warranted, the statement of need will provide direction to potential consultants. The statement of need will also be useful in establishing a basis for evaluating the consultants' proposals.

2.6 Cost/Benefit Analysis

After defining the need, it may be beneficial to assess the need versus the cost of obtaining desired results. This cost/benefit analysis enables the agency to determine very early if a project is warranted and to identify the specific

benefits that will be obtained by the project. This analysis acknowledges that any benefit has an associated cost, not only in consulting fees, but also from possible changes in agency systems, procedures, and techniques requiring staff training, new equipment or special management attention.

The agency, at this point, should define what is expected from a consultant to achieve the identified benefits. Issues to consider include:

- *What level of technical expertise is needed?*
- *When is the service required?*
- *How is the consultant to approach the problem or task?*
- *Where is the service to be delivered?*
- *What products should the consultant deliver?*

The cost of private consulting services is dependent upon a combination of factors, including:

- *Scope and depth of the task*
- *Urgency for delivery*
- *Level of expertise required*
- *Availability of qualified consultants*
- *Reputation and professional stature of the consultant*
- *Risk associated with the project*
- *Experience level required for the project*
- *Project travel and related costs*

Potential benefits of contracting for services may include:

- *Savings to state government and taxpayers*
- *Expertise in areas not currently available*
- *Decrease in workload and equipment requirements*
- *Ability to meet geographic needs*

2.7 Available Funding

One of the most important considerations to be addressed during the planning process is the availability of sufficient funding to cover the project expenditures. Adequate funding based on in-house cost projections must be verified by the contract manager. If funding is inadequate or non-existent, the project cannot proceed.

When funding is available, the type of appropriation should be considered. For state agencies whose funds are appropriated for a fiscal year or biennial period, those funds cannot be disbursed for work performed in a subsequent period. A state-funded contract can cross biennial lines, but the contract should contain a term indicating services beyond June 30 are subject to availability of funding.

In addition to the identified costs associated with contracting for personal services, contract managers should also consider overhead expenses, such as costs for staff involvement with contract development, contract management, monitoring and internal fiscal processes, training, legal review of the contract, and dispute resolution.

2.8 Available Public Resources

After the required service is defined, agencies must determine the availability of qualified public resources before considering a private consultant. RCW 39.29.008 (2) and (3) prohibits entering into personal services until an agency can document that public resources are not available. Technical expertise may be available from a variety of sources, such as:

- Employees within the agency.
- Other state, federal, and local agencies that have conducted similar projects, encountered similar problems, or have similar functional responsibilities.
- Other Washington State agencies with specialized professional expertise.

2.9 Legal Constraints to Contracting

Certain legal requirements must be carefully considered before contracting for outside consulting services. **However, many provisions of the 2002 personnel system reform legislation will impact the items below when they become effective in July 2005.** Detailed information will be provided prior to the effective date.

Traditional State Work – State agencies should not contract if the needed service constitutes work traditionally or historically performed by state employees unless there is specific legislative authority to do so. (Washington State Supreme Court ruling in Washington Federation of State Employees v. Spokane Community College, 90 Wn.2d 698, 1978)

Termination of Classified Employees – The contract should not be entered into if execution of a contract would have the effect of terminating classified employees or classified employee positions currently existing at the time of the execution or renewal of the contract. (RCW 41.06.380)

Collective Bargaining – A personal service contract should not be awarded if contracting would adversely affect any collective bargaining agreements.

The agency should seek legal advice from the Assistant Attorney General regarding these or similar situations where legal requirements are uncertain.

2.10 Access to Data

RCW 39.29.080 prohibits state agencies from entering into personal service contracts when the contractor could charge additional costs to the agency, the Joint Legislative Audit and Review Committee, or the Office of the State Auditor for access to data generated under the contract. For the purposes of this requirement, “data” includes all information that supports the findings, conclusions and recommendations of the contractor’s reports, including computer models and methodology for those models.

2.11 Merit System Alternatives to Contracting

Merit system rules also provide alternatives to personal service contracting. The following items provide a brief definition of options available. For additional information, contact your agency Personnel Office or the Department of Personnel.

Emergency Appointments – Emergency appointments can be made for up to 30 calendar days, may be made on short notice, and do not require that the employee meet minimum qualifications.

Temporary Appointments – Temporary appointments may last for no more than nine months total for any single or multiple appointments within a continuous 12-month period. The employee must meet the minimum qualifications for the job class.

Intermittent Appointments – Intermittent appointments may be made for up to 1,560 hours during any consecutive 12-month period, but they may not be used for regular full-time work. Intermittent appointments are used when there is no particular pattern or predictable schedule. The employee must meet the minimum qualifications for the job class.

Part-time Appointments – Appointments may be made on a part-time basis, as needed, but must be referred from a register. These are permanent appointments into civil service. The employee must meet minimum qualifications for the job class.

Project Appointments – Project appointments may be made when the length of employment is contingent on state, federal or other grant funding for specific and non-continuing projects. Employees must meet minimum qualifications for the job class. Employees are terminated when funding for the project ends. Projects are approved and established by the Department of Personnel and normally last up to two years.

WMS Appointments – The Washington Management Service (WMS) also provides for non-permanent, acting appointments that may be made when necessary to meet an agency's organizational needs.

Contracts for services that appear to have any of the following elements should be reviewed by the agency

personnel office or Assistant Attorney General to determine the appropriateness of award. This includes any contract that:

- Circumvents or avoids the competitive employment procedures of the state civil service system.
- Performs a job that a classified employee can do.
- Performs a job that could be accomplished by resources within the agency or other state agencies.
- Creates a full-time, continuous position.

2.12 Using State Certified Minority and Women Owned Firms

RCW 39.19 requires agencies and educational institutions to ensure that businesses owned and controlled by minorities (MBEs) and women (WBEs) are afforded the maximum practical opportunity to contract directly and/or to subcontract with the state and to meaningfully participate on state contracts. The Office of Minority and Women's Business Enterprises (OMWBE) sets annual voluntary participation goals for agencies and educational institutions by class of contract. Currently, the overall goals for personal (professional) services are 10 percent for MBEs and 4 percent for WBEs. OMWBE may be contacted at (360) 753-9693 for information or assistance in locating certified minority or women owned businesses.

Goals may be established for individual competitive procurements, but the procurement document must state that the goals for MBE and/or WBE participation are voluntary. No preferences for MBE and/or WBE participation will be included in scoring of the proposals, no minimum level of MWBE participation shall be required as a condition for receiving an award, and proposals will not be rejected or considered non-responsive for not including MWBE participation.

While the goals are voluntary for state agencies, achievement of the goals is encouraged. When goals are included in the solicitation document, consultants are to include in their proposals the names of any minority and/or women owned firms they plan to involve. Only firms that are certified by OMWBE will count toward the goals. Proposals should also include the percentage or dollar value

of the work and a description of the services the MBE and/or WBE firm(s) will be providing.

Contract specifications may provide that the contractor report the MBE and WBE participation to the awarding agency indicating the amount paid to the firm(s) and the nature of the services performed. Agencies, in turn, report payments made to the certified firms through either the on-line Agency Financial Reporting System or through their own electronic medium in a format approved by OMWBE.

Failure to comply with MBE and WBE contract provisions may result in termination of the contract.

2.13 Independent Status of a Contractor

An essential criterion in the use of personal services is the independent entrepreneurial relationship between the contractor and the agency. Agencies could potentially be subject to payment of fines by the Internal Revenue Service and the Social Security Administration, if a determination of "employee" status is made regarding the agency's contracts.

Federal employment tax regulations essentially convey that every individual is an employee, if under the usual common law rules the relationship between the individual and the person for whom services are performed is the legal relationship of employee/employer. To determine whether a worker is an independent contractor or an employee, one must examine the relationship between the worker and the state. All evidence of control and independence in this relationship should be considered. The facts that provide this evidence fall into three categories – Behavioral Control, Financial Control, and the Type of Relationship itself.

Behavioral Control covers facts that show whether the state has a right to direct and control how the work is done, through instructions, training, or other means.

Financial Control covers facts that show whether the state has a right to control the business aspects of the worker's job. This includes, but is not limited to:

- The extent the worker has unreimbursed business expenses,

- The extent of the worker's investment in the business,
- The extent the worker makes services available to the relevant market,
- How the business pays the worker, and
- The extent the worker can realize a profit or incur a loss.

Facts covered by *Type of Relationship* include, but are not limited to:

- Written contracts describing the relationship the parties intended to create,
- The extent the worker is available to perform service for other, similar businesses,
- Whether the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay, and
- The permanency of the relationship.

After consulting with your own agency staff, contract managers may want to consider consulting with the Office of the Attorney General or the OFM Accounting Division to ensure this determination is made correctly.

2.14 Performance Measures and Outcomes

Agencies may want to consider whether performance measures and outcomes should be identified in the contract. The purpose of performance measures is to provide a standard or measure for performance of the contracted services. Performance measures are also used to determine if, and when, the contractor has successfully completed performance, and when and how much the contractor should be paid.

Contract performance measures may:

- Define the standards for measuring contractor performance.
- Provide a means to monitor performance.
- Measure satisfaction with the contractor.

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- Provide data for program evaluation.

The purpose of performance measures in a contract is to provide a standard or measure for quality and performance of the services provided.

When developing performance measures, consideration should be given in advance to how the data is to be submitted, analyzed, and maintained. Key questions to consider include:

- How much information can reasonably be requested, submitted, and analyzed?
- How often and on what schedule must the data be reported?
- How will the information be submitted?
- Who will receive the information?
- How will feedback be provided to the contractor?
- What is the cost and benefit of each proposed performance measure?

Characteristics of good performance measures:

- Are easily understood by contractors, state agencies, and the general public.
- Focus on the performance expected from the contractor.
- Are well defined and consider both the quantitative (how much?) and qualitative (how well?) aspects of performance.
- Include a well-defined method for reporting data.
- Are relevant, timely, and verifiable.
- Are realistic in terms of available resources, funding and timelines, and recognize external factors beyond the control of the system.

Contract managers should check the funding source(s) or statutory authority to determine whether any specific outcomes are mandated. Then, consider the following questions:

- How will you know the service has actually been provided (other than taking the contractor's word for it)?
- Are you concerned about the *quality* of the service? If so, include a mechanism for measuring quality.

- Are you looking for a specific outcome?
- Is payment contingent on an event, product, or outcome? If so, how will you ascertain that the contractor has satisfied the requirement? If not, consider tying payment to an event, product, or outcome.

2.15 Master Personal Service Contracts

Department of General Administration

Agencies may acquire personal services through master personal service contracts competitively awarded by the Department of General Administration (GA) State Purchasing, Professional Services Solutions team. Services available through GA master contracts include: appraisal services, management consulting, investigative services, audit services, environmental consulting services, customer survey services, and information technology services.

To access the services, agencies conduct a second-tier competitive process that meets the requirements of formal solicitation when conducted in accordance with GA's process. When using GA's second-tier competitive process agencies are to maintain adequate documentation to substantiate that all bidders were treated equally and fairly and that an equitable and impartial competition was conducted under the second-tier process.

Simply accessing names of firms from GA's list does not satisfy the requirement for second-tier competition. An agency must issue a work request to multiple vendors on the pre-qualified vendor list established by GA. The agency must evaluate responses to the work request. The agency will award a work contract to the bidder whose response best meets the requirements of the work request.

The non-Information Technology (IT) personal service contracts awarded under GA's second-tier competitive process **do not** require filing with OFM. GA has filed the contracts under the first-tier competitive process and reports activity under the contracts to OFM.

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The IT personal service contracts awarded under GA's second-tier competition *do* require filing with OFM and are subject to the applicable filing periods.

Department of Personnel

Agencies may also acquire personal services from the Department of Personnel's master personal service contracts. These contracts are primarily awarded for training services, but contracts are also available for organizational consulting services. Visit DOP's website for more information.